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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHET AND THE ORDER OF RAILROAD TELEGRAPHERS,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP,

Respondents.

BRIEF FOR RESPONDENT, ILLINOIS CENTRAL RAILROAD COMPANY.

JOHN W. FOSTER,
HERBERT J. DEANY,
CHARLES I. HOPKINS, JR.,
Attorneys for Respondent, Illinois Central Railroad Company.

JOSEPH H. WRIGHT,
135 East Eleventh Place,
Chicago 5, Illinois,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

BRIEF FOR RESPONDENT, ILLINOIS CENTRAL RAILROAD COMPANY.

OPINION BELOW.

The District Court did not write an opinion. Its findings of fact, conclusions of law and order appear in the record at pages 35-41. The opinion of the Court of Appeals (R. 45-60) is reported in 212 F. 2nd 22.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 19, 1954 (R. 60). The petition for a writ of certiorari was filed June 11, 1954, and granted October 14, 1954 (R. 63). The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code as amended.

QUESTIONS PRESENTED.

1. Whether Section 3 First (j) of the Railway Labor Act requires the National Railroad Adjustment Board to give notice of hearings and opportunity to be heard to all "involved" employees and their unions.

2. Whether an employee performing certain work and his union are "involved" in a dispute before the Board between a railroad and another union claiming the same work.

3. Whether the courts may require the Board to discharge its statutory duty.

STATUTE INVOLVED.

Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)] provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

STATEMENT.

Contrary to statements in the brief of petitioners, this case is exactly what the court below said it is—an action "to require the Board to perform its statutory duty as a prerequisite to its authority to proceed" (R. 56).

In June, 1951, The Order of Railroad Telegraphers (hereinafter referred to as Telegraphers) instituted a proceeding against the Illinois Central Railroad Company (hereinafter called Illinois Central) before the National Railroad Adjustment Board, Third Division (hereinafter called Board) (R. 28). That proceeding involves a claim

of the Telegraphers to certain work at Palestine, Illinois, which work is presently done by D. A. Shears, a member of the craft or class represented by the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Clerks) (R. 28, 36).

After the Telegraphers' claim was filed with the Board, Illinois Central was informed in writing by the General Chairman of the Clerks that in the event the employment rights of the present incumbent of the position in question were adversely affected by the claim filed by the Telegraphers, the Clerks would present and prosecute a claim against Illinois Central based upon the same employment rights which are involved in the Telegraphers' proceeding (R. 30-31, 38).

There is no showing in the record that D. A. Shears, the incumbent of the position in question, has had notice, either actual or constructive, of the pending proceeding (R. 37).

On August 11, 1951, Illinois Central filed its submission with the Board, specifically setting forth, *inter alia*, that the work involved was being performed by a member of the Clerks and was plain, ordinary clerical work of the type customarily performed by clerical forces on Illinois Central's property and in the industry generally (R. 28, 36).

The ten-member Board deadlocked on the merits of the Telegraphers' case. As a result, the Mediation Board appointed a referee to resolve the deadlock on the merits pursuant to Section 3 First (l) of the Railway Labor Act (R. 27, 36).

In May, 1953, the proceeding before the Board came on for hearing. At that time the question of giving notice under Section 3 First (j) of the Railway Labor Act to D. A. Shears and the Clerks was considered by the Board

for the first time (R. 28-29, 37) through an objection made by a carrier member of the Board. He objected to proceeding with the case until the required due notice was served on involved employees whom he defined as "the Brotherhood of Railway Clerks, or constituents thereof" (R. 18, 19-20, 28-29, 37). Said carrier member of the Board further called the Board's attention to the fact that Illinois Central had been served with a notice of the Clerks' "intention to file and prosecute claim for the same work involved in this proceeding if the claim brought by the Telegraphers' organization is sustained" (R. 18). Thereupon, the Board went into an executive session to consider said objection and, pursuant to its custom, excluded the referee from consideration of the due notice question (R. 20, 29, 37). During this executive session, the ten regular members of the Board voted on the objection to proceeding with the case in the absence of notice under Section 3 First (j). The result was a tie vote and, therefore, the objection failed to carry (R. 19, 20, 29, 37). The public session of the Board was then reconvened. In accord with the usual practice of the Board, the referee was not requested to vote on the due notice question, nor did he request an opportunity to do so although the vote on the question had resulted in a tie (R. 18-19, 29, 37). The same carrier member again objected to further proceeding until the Board had given notice pursuant to Section 3 First (j) of the Railway Labor Act. Notwithstanding said objection, the hearing was resumed (R. 29, 37).

In May, 1953, Illinois Central filed a verified complaint in the District Court (R. 1) and thereafter moved for an order directing the Board to serve due notice upon D. A. Shears and upon the Clerks, or, in the alternative, enjoining further proceedings by the Board until such notice was served (R. 3).

The complaint set forth that for several years the Board has denied and continues to deny the right of participa-

tion in proceedings before it to any persons not formally served with notice and that such practice violates the Railway Labor Act and the due process clause of the Fifth Amendment (R. 30).

The Telegraphers were permitted to intervene and file an answer (R. 1, 11-15). The carrier members of the Board also filed an answer to the complaint (R. 15-26).

In their answer, the five carrier members of the Board admitted:

> (a) That Section 3 First (j) of the Railway Labor Act requires that due notice be given to D. A. Shears and the Clerks (R. 16).
>
> (b) That the First Division of the National Railroad Adjustment Board complies with the due notice provision of Section 3 First (j) of the Act (R. 16).
>
> (c) That the Department of Justice refused to represent the Third Division of the National Railroad Adjustment Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N. D. Ill. 1953), affirmed 212 F. 2nd 32, C. A. 7 (1954), on the ground that said Division's failure to give due notice deprived employees of their constitutional and statutory rights (R. 16-17, 23-25, 51).
>
> (d) That the five carrier members are willing to serve the requisite due notice but that the five labor members are unwilling to do so (R. 17).
>
> (e) That only persons receiving due notice pursuant to Section 3 First (j) of the Railway Labor Act are permitted to participate in proceedings before the Board (R. 17-18) and that persons having merely actual notice of proceedings before the Board are not permitted to participate therein (R. 26).

The District Court entered findings of fact and conclusions of law in favor of Illinois Central (R. 35-40) and issued a preliminary injunction which enjoined the Board from proceeding with the defendant Telegraphers' claim

(a) until the Board gives formal notice to D. A. Shears and the Clerks and (b) permits said persons to participate in the proceedings before the Board (R. 40-41).

The labor members of the Board and the Telegraphers appealed from the order of the District Court (R. 42) but neither the Board nor the referee appealed. The Court of Appeals affirmed the order of the District Court, Judge Swaim dissenting[1] (R. 45-60).

[1] Less than three months later Judge Swaim, as one of the Judges of a unanimous court, ordered the First Division of the Board to reopen five of its dockets and to give notice and an opportunity to be heard to employees involved in those dockets in which five awards (rendered in 1942) had been declared void because the Board had failed to comply with Section 3 First (j) of the Act. *Brotherhood of Railroad Trainmen* v. *Swan*, C. A. 7 (1954), 214 F. (2d) 56. Prior to his appointment to the federal bench, Judge Swaim, while acting as a referee for the Third Division, held that notice under Section 3 First (j), was required to be given only to the claimant and the carrier.

SUMMARY OF ARGUMENT.

I.

The Board did not appeal. Neither the referee nor the five carrier members of the Board appealed. In the absence of an appeal by the Board, the individual labor members, who do not represent the Board or even a majority of the Board, have no standing to prosecute an appeal from an order which does not affect them in their individual capacities.

Telegraphers, only intervenor in this case, have no standing to progress an appeal from an order which does not run against them merely because the order may affect them indirectly. *Boston Tow Boat Co.* v. *U. S.*, 321 U. S. 632.

II.

Railway Labor Act requires that Board give notice to all employees and crafts involved in dispute before Board. Word "shall" in Section 3 First (j) of Act is used in its imperative and mandatory sense. Employee who will be displaced if claim before Board is sustained is an "involved" employee. Craft to which such employee belongs is also involved in such dispute. Courts have uniformly held that one presently doing work which is claimed before the Board and his union are "involved." Legislative history of Act shows it was the intent of Congress that the employee who will be displaced if claim is sustained and also his union should be given an opportunity to be heard before the Board.

After giving the requisite statutory notice and opportunity to be heard, it is for the Board to decide which contract applies or whether they overlap. *Order of Con-*

ductors v. *Pitney*, 326 U. S. 561; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239.

The Board should follow the mandate of Congress in order that it may issue a valid and binding award that will accord protection to the carrier and all employees and unions involved in the dispute.

III.

There is no showing that the individual doing the work claimed before the Board has actual notice. Actual notice does not meet the requirements of due process as the Board only permits those having received "formal notice" to participate in the proceedings. Fundamental requisite of due process is opportunity to be heard. Illinois Central is entitled to have all employees and unions who are "involved" in disputes before the Board given notice and opportunity to be heard.

IV.

Rule requiring exhaustion of administrative remedies does not apply where, as here, defect urged goes to the jurisdiction of the administrative agency. Compliance with jurisdictional requirements of statute is not a discretionary matter. *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557; *Kansas City So. Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178. If an administrative agency refuses to comply with a statutory command, it nullifies its most essential duties.

Case or controversy arises when question respecting laws of the United States has assumed such form that judicial power is capable of acting on it, a declaration on rights as they stand is sought and when there is an actual controversy over the issue. *In Re Summers*, 325 U. S. 561.

The defense of an enforcement suit under Section 3

First (p) of the Railway Labor Act is neither an exclusive nor an adequate remedy. The defense of such a suit will not secure the service of the notice required by Section 3 First (j) of said Act. The Board can be compelled to obey the mandate of Congress.

Failure of the Board to give requisite notice invalidates its decision or award. *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2d 793, 797; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2d 527, 534. It is not uncommon for labor organizations to forego judicial enforcement of an award in favor of economic enforcement, *i. e.*, strike threats. Nineteenth Annual Report of the National Mediation Board for the year ended June 30, 1953, p. 23, lines 8-10; *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, (D. C. N. D. Ill. 1954), 26 Labor Cases, ¶ 68,671, finding 111. Failure of Board to serve notice extends period during which Illinois Central is subjected to possible obligation of double payments for one position. Compliance with or defiance of award entered without the requisite notice would be certain to result in additional claims or litigation by employee refused employment or by his union. Controversial matters concerning same work can and should be considered in one proceeding before the Board. It is well-settled that courts have jurisdiction to enforce the commands of the Railway Labor Act. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515.

V.

Judicial intervention is required to rectify the Board's disregard of the notice requirements of Section 3 First (j). Board's failure to follow the mandate of Congress (to give notice and an opportunity to be heard to employees and unions involved in a dispute) and the directions of this Court in *Order of Conductors* v. *Pitney*, 326 U. S. 561 and *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 (to con-

strue the Telegraphers' contract with the railroad in the light of the Clerks' contract with the railroad, taking into account evidence as to usage, practice and custom), results in "a jurisdictional frustration on an administrative level". *Order of Conductors* v. *Swan*, 329 U. S. 529. Refusal of Board to serve requisite notice upon employees and their unions involved in disputes and to give such employees and unions an opportunity to be heard thwarts the objective of the Railway Labor Act. There is no finality to the Board's awards which are void for lack of jurisdiction. Board cannot properly construe the rights of the respective employees and crafts, giving due regard to usage, custom and practice, unless the carrier and all employees and unions involved in the dispute are before the Board. In an enforcement action, a carrier would not be permitted to implead an employee and a union who were not before the Board although they are involved in the dispute. Employee or union bringing enforcement suit can select a forum where carrier would not be able to get service upon an employee or union involved in the dispute.

ARGUMENT.

I.

PETITIONERS HAVE NO STANDING TO PROGRESS THIS CASE.

It is respectfully submitted that the appeal in this case should be dismissed for reasons hereinafter presented which have not been heretofore considered by this Court.

A. The Board Has Not Appealed From the Order of the District Court and the Board Has Not Sought Certiorari From This Court.

The National Railroad Adjustment Board is an administrative agency created under Act of Congress. The Third Division thereof consists of ten members, five of whom are selected by railroad unions and represent railroad labor and five of whom are selected by the rail carriers and represent the carriers [45 U. S. C. 153 First (h)]. The ten members of the Third Division were named in this proceeding as defendants only in their status as members of the Board (R. 26). The Board appeared in the case (R. 33) and the injunction was entered against the Board (R. 41). Although the injunction was entered against the ten individuals, it only applied to them "as members of and constituting the Third Division of said Board" (R. 41). The Board did not appeal (R. 42). Neither the referee nor the five carrier members of the Board appealed (R. 42). In fact, the five carrier members of the Board filed an answer in the District Court admitting that Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)] requires the service of notice upon involved employees; admitting that Shears and the Clerks

are "involved" employees and alleging that they have been, and are, willing for the Board to serve due notice as required, but that the five labor members are unwilling to do so (R. 16-17). Thus it appears that the appeal to the court below and the petition in this Court were not presented by the Board or even by a majority of the Board.

It is respectfully urged that, in the absence of an appeal by the Board itself, the five dissenting individual labor members, who do not constitute a majority, have no standing to prosecute an appeal from the order of the court below, which order does not affect them in their individual capacities. A contrary rule would allow the dissenting members of any public agency to progress an appeal if they so desired.

B. Intervenor The Order of Railroad Telegraphers Has No Standing to Progress This Case.

Although the Telegraphers intervened in this case in the District Court (R. 4), the order of the District Court does not run against that organization and does not require it to do anything or forbid it from doing anything (R. 41).

This Court has, in the past, held intervenors cannot appeal from an order which does not run against them just because the order might affect them indirectly. *Chicago* v. *Chicago Rapid Transit Co.*, 284 U. S. 577; *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632.

In the *Chicago Rapid Transit* case (284 U. S. 577) the City of Chicago intervened in a federal District Court action which was brought to enjoin administrative action. The District Court issued a preliminary injunction from which the administrative body and the governmental authorities chose not to appeal. The intervenor sought to appeal, asserting that the injunction would harm

it since the injunction was against the enforcement of certain transit rates within the City. In dismissing that appeal, this Court said (284 U. S. 578), "The City of Chicago has no separate standing which entitles it to appeal from the decree." To the same effect is the language of this Court in the *Boston Tow Boat* case (321 U. S. 632, 634) wherein the Court said that the intervenor there did not have "such an 'independent right which is violated' by the decision against Cornell as will support an independent appeal."

II.

PREFACE TO ARGUMENT ON THE MERITS.

Before answering Petitioners' arguments, respondent Illinois Central has, for the convenience of the Court, listed similar arguments and the answers made thereto by the court below in its decision in the instant case and in what might be termed its companion case, *Allain* v. *Tumnon et al.*, C. A. 7 (1954), 212 F. (2d) 32.

ILLINOIS CENTRAL RAILROAD COMPANY,

v.

J. W. WHITEHOUSE, ET AL.

C. A. 7 (1954), 212 F. (2d) 22.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.	HOW THE COURT OF APPEALS ANSWERED IT.
R. 51. "Telegraphers in its brief states that the action is premature because 'The Board's decision may be in accord with the railroad's contentions'. Closely allied with this issue is that the district court was without jurisdiction to grant an injunction 'because the railroad	R. 51. "This brings us at once to the contention advanced by the Carrier that the Referee is without authority to participate in a decision as to whom notice shall be served upon but that such determination must be made by the Board as originally constituted. No authority

has failed to exhaust its administrative remedies'. Relative to the former contention, it is argued that the Carrier 'may never be hurt by the allegedly improper procedure the Board is following' because the Board, if permitted to decide, 'may decide for the railroad on the procedural ground or on the merits or on both. In any such event no harm would be caused to the railroad'. It is asserted that the Board, with the Referee sitting as a member, may decide the issues favorably to the railroad and that in fact the Board has, with the Referee sitting as a member, denied a number of awards because of the lack of notice to third parties." (212 F. (2d) 27.)

is cited and we know of none where this question has been decided but we are [R. 52] convinced from our study of the statute that the contention is sound. The first duty or obligation imposed upon the Board after a claim has been filed is that contained in (j) (heretofore quoted). That paragraph contains the unequivocal command that the Board 'shall give due notice of all hearings.' At that stage of the proceeding, it appears plain that there is no Referee and there could not be, by reason of the subsequent provisions which define the conditions and circumstances under which a Referee may be brought into the proceeding".

"Paragraph (l) provides that 'upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members,' such division shall agree and 'select a neutral person, to be known as "referee," to sit with the division as a member thereof and make an award.' In case the members of the division are unable to agree upon and select a referee, then such fact may be certified to the Mediation Board, which shall select and name the Referee, 'to sit with the division as a member thereof, and make an award.' It appears certain that paragraph (l), providing for the selection of a Referee, presupposes that the Board has complied with the 'due notice' provision of paragraph (j). Moreover, the Referee, whether selected by members of the division or by the Mediation Board, is authorized to sit as a

member of the Board only for the purpose of 'making an award.' His authority to sit as a member for that purpose bears no relation to the obligation imposed upon the Board to give 'due notice.' That the Board is without power to proceed until it has complied with the 'due notice' requirement of paragraph (j) is evidenced by the fact that an award made in the absence of such notice is void, and a study of the relevant provisions of the statute leaves little, if any, room for doubt but that the selection of a Referee is authorized only in the event that the division is deadlocked or unable to agree on the making of an award. In such case, a Referee is selected evidently to break the deadlock or, in the language of the statute, 'to sit * * * as a member * * * and make an award.' It appears that the Board recognized this limited authority of the Referee because he did not participate or at any rate did not vote on the notice controversy." (212 F. (2d) 27-28.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.

R. 52. "Telegraphers in its brief further states, 'We cannot assume that the Board will make an erroneous decision. [R. 53.] In any event, until the Board makes its decision the courts are without jurisdiction to advise the Board of the correct decision', and 'To be sure, the Board might make a decision that would turn out, on appropriate judicial review to be wrong. But the mere possibility

HOW THE COURT OF APPEALS ANSWERED IT.

R. 53. "This argument, if can be thus dignified, begs the whole question. It is based on the false assumption that the Board possesses the power to make an award without giving 'due notice' and an opportunity to involved parties to be heard. Obviously the Court has not and will not advise the Board as to the kind of decision it should make. On that score we at present have no concern. The

of an erroneous decision is hardly the basis for enjoining administrative action.'" 212 F. (2d) 28.

point is that the Board, under the situation existing, is without power to make any decision, right or wrong. And it must be remembered that the order under review does nothing more than restrain the Board from proceeding until it has complied with the statutory command."

"The only case called to our attention where a restraining order has been issued under circumstances similar to those here is that of *Townsend* v. *National Railroad Adjustment Board*, Fourth Division, D. C. N. D. Ill., 117 F. Supp. 654, 658 (Judge Campbell). In that case, it was the Fourth Division which refused to give notice under Sec. 153 sub. 1 (j), and the court issued an order in form almost identical to that of the present case. There, as here, the jurisdiction or authority of the court was under attack. The court * * * stated: 'Congress has commanded in express terms that the several divisions of the N. R. A. B. "shall give due notice of all hearings to the employee or employees * * * involved in any disputes submitted to them"; but Congress has not expressly defined a remedy for employees involved in a dispute who have not been given notice. If a district court lacked jurisdiction to order that notice be given, the "right" to notice conferred by Section 3 would become mere verbiage, a right without a remedy. Congress could not have intended that result'. We think that is a sound statement. True, it was made in a case where the relief sought was by an [R. 54] aggrieved employee rather than

by the Carrier, as here, but even so, we discern no difference insofar as the jurisdictional issue is concerned." 212 F. (2d) 28.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.

R. 54. "* * * we are urged to hold it [the Board] should be permitted to proceed to a hearing and a decision on the merits as a pre-requisite to the right of a court of equity to interfere."

HOW THE COURT OF APPEALS ANSWERED IT.

R. 54. "Here the Board has had an opportunity to pass upon the notice issue and has refused to comply with the statute, * * * Thus, a court [according to this agreement], before it can interfere, must sit idly by until the Board has engaged in a mock proceeding. Such reasoning is devoid of all logic."

R. 54. Telegraphers contend "that in any event the Carrier has no standing to institute such an action because it has shown no harm or damage and may never be able to do so, depending upon the decision which the Board makes on the merits." 212 F. (2d) 29.

R. 54. "We think this contention is without merit. The Carrier has been involuntarily brought into the proceeding by action of the Board. In order to protect its rights and property, it must resist the Telegraphers' claim by participating in the proceeding. To do so it must expend time, labor and money in a fruitless effort to protect itself from a potential award rendered in a proceeding in which the Board is without jurisdiction. Moreover, the [R. 55] Carrier is threatened not only with an abortive proceeding before the Board but by the Clerks in an action concerning the same employment rights." 212 F. (2d) 29.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.

R. 55. Telegraphers contend "that the action must fail because it is shown that the Clerks had actual notice and that [as] it was the representative of Shears," he likewise had actual notice. 212 F. (2d) 29.

HOW THE COURT OF APPEALS ANSWERED IT.

R. 55. We think the contention that the action must fail because it is shown that the Clerks had actual notice and that it was the representative of Shears is likewise, under the circumstances, without merit for

a number of reasons. It is true that actual notice has been recognized as sufficient in some of the cases where the attack was upon the validity of the award. Here, however, it is sought to be utilized as a justification for the Board's refusal to comply with the statute. More than that, under the statute the employee (Shears) was entitled to notice the same as the Clerks, and it is not shown that he had notice of any kind. Of more importance, however, is the fact that actual notice would have served no purpose insofar as it afforded protection to the Clerks or Shears of either their statutory or constitutional right to be heard because, as the record plainly shows, the Board would not have permitted them to be heard with that kind of notice. A hearing would have been allowed only to those receiving formal notice. Such being the situation, the Board cannot hide behind the pretext that actual notice is sufficient and at the same time say that only those given formal notice will be heard. 212 F. (2d) 29.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.

"* * * It is asserted that the Clerks and Shears had no desire to be heard." 212 F. (2d) 29.

HOW THE COURT OF APPEALS ANSWERED IT.

R. 55. "Even so, that is beside the issue and no concern of the Board. The point is that the Board must accord the opportunity to be heard. When that has been done, the beneficiary of the right may exercise it or not, as he (or it) sees fit. It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes fur-

nishes the basis for protracted litigation. Instead of [R. 56] serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute." 212 F. (2d) 29.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.

R. 56. "Telegraphers argues, and we assume it is the Board's position, that the Board is without authority to consider two agreements simultaneously and for that reason notice was not required to be served upon the Clerks or Shears." 212 F. (2d) 29.

HOW THE COURT OF APPEALS ANSWERED IT.

R. 56. "That contention has been rejected by this court in *Missouri-Kansas-Texas R. Co. et al.* v. *Brotherhood of Ry. & S. S. Clerks et al.*, 188 F. 2d 302. Referring to *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, this court stated (page 306): 'That case also involved a dispute between two groups of employees, both of whom claimed the same jobs by virtue of the agreement of each with the carrier. There the Supreme Court upheld the function of the Adjustment Board to resolve the conflict, but indicated that in doing so, the Board must consider both agreements together, stating 326 U. S. at page 567, 66 S. Ct. at page 325, "O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood." ' 212 F. (2d) 29-30.

Allain v. Tummon, et al.

C. A. 7 (1954) 212 F. (2d) 32.

Argument of Union.

"The Brotherhood argues that the decision in the case at bar should not be governed by the rule announced in the decisions by this Court hereinbefore quoted, because the claim it submitted to the Board upon behalf of the dining car stewards was for money damages only. The Brotherhood says that it did not ask that plaintiffs be removed as tavern car attendants; hence plaintiffs were not 'employees' involved in the dispute between the dining car stewards and the Carrier." 212 F. (2d) 36.

How the Court of Appeals Answered It.

"The Carrier admitted that it displaced the plaintiffs from their jobs as attendants in the lounge-buffet cars because of Award No. 5123, and the order made pursuant thereto." 212 F. (2d) 36.

Argument of Union.

"We note the contention of the Brotherhood that the Carrier instead of replacing the plaintiffs with dining car stewards might have discontinued serving food in the lounge-buffet car or might have attempted to obtain an amendment of its contract with the dining car stewards." 212 F. (2d) 36.

How the Court of Appeals Answered It.

"However, we hold that in presenting its claim to the Board the Brotherhood was in effect asking that the plaintiffs be replaced by dining car stewards. It follows that the plaintiffs were 'employees' involved in the dispute within the meaning of § 3, first (j) of the Railway Labor Act, and, having received no notice of the hearing and in any event being unable to participate in the hearing, the Adjustment Board was without jurisdiction to promulgate or render Award No. 5123 and its accompanying order.'" 212 F. (2d) 36.

III.

THE RAILWAY LABOR ACT REQUIRES THAT NOTICE SHALL BE GIVEN TO ALL EMPLOYEES AND UNIONS INVOLVED IN DISPUTES BEFORE THE BOARD.

The single issue in this case is whether or not the Board is required to give D. A. Shears and the Clerks notice, as required by Section 3 First (j) of the Act, in a proceeding instituted by the Telegraphers in which that organization is claiming for its members the right to perform work presently done by Shears, a member of the Clerks' union.

Petitioners, in their brief, misrepresent the position of Illinois Central. It is not the position of Illinois Central that "the federal courts [should] require the Board to pass upon questions of craft jurisdiction and abrogate, in whole or in part, contracts between carriers and labor organizations" (Br. 30). It is the position of Illinois Central that Section 3 First (j) of the Railway Labor Act requires the Board to give notice to all employees and their unions "involved" in any dispute submitted to it and that in resolving such dispute the Board must consider the agreements of each in the light of the other, together with the usage, practice and customs of the industry, or of the particular carrier. *Order of Conductors of America* v. *Pitney*, 326 U. S. 561, 567; *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239.

Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)] provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board *shall give due notice* of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them." (Emphasis supplied.)

This language of the statute clearly shows Congress intended to safeguard the rights of all persons who might be affected by an award by requiring the Board to give such persons due notice of the proceeding. The word "shall" when appearing in a statute is presumed to be used in its imperative and mandatory sense. This is particularly so when, as in this case, the word "shall" is addressed to those acting in a quasi-judicial capacity and a contrary construction will destroy a right which is given or preserved by use of the word. No other construction of the word "shall" as it appears in the above section could be inferred, for it is essential to the proper administration of justice that formal notice be given to all who may be adversely affected in any proceedings of a quasi-judicial nature. This principle is concisely stated in Merrill on Notice,[1] as follows:

> "* * * if the administrative body acts judicially, notice and opportunity for hearing are indispensable to due process."

If then, the Clerks and D. A. Shears are "involved" in the proceeding before the Board, the requirements of due process dictate that notice must be served upon each of them. In its claim, filed with the Board, the Telegraphers demand the right to perform certain work presently done by D. A. Shears (R. 28, 36). In other words, the Telegraphers seek to transfer to a telegrapher the work now being done by a clerk. Under these circumstances there can be no doubt that Shears and the Clerks are "involved" within the meaning of Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)] in the proceeding before the Board. Petitioners have stated (Br. 35) that "until the complaint was filed in this action,

[1] Merrill on Notice, First Edition (1952), Volume 1, Chapter 11, Section 517, page 507.

it had apparently never occurred to anyone that in a situation where the person performing the claimed work was himself covered by a collective bargaining agreement, notice was required to such person." Contrary to Petitioners' statement, the courts have, since 1936, uniformly held that under conditions similar to those existing in this case, Section 3 First (j) of the Railway Labor Act requires that notice be served upon those whose jobs and job rights are sought or affected by the claims of others. *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. 2d 302, 305-306; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1948), 171 F. 2d 594; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1951), 188 F. 2d 294, 300-301; *Estes* v. *Union Terminal Co.*, C. A. 5 (1937), 89 F. 2d 768, 770; *Brotherhood* v. *Pennsylvania R. Co.*, D. C. W. D. Penn. (1952), 107 F. Supp. 924, 927; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2d 527, 534; *Nord* v. *Griffin*, C. A. 7 (1936), 86 F. 2d 481, 484; *Allain* v. *Tummon*, C. A. 7 (1954), 212 F. 2d 32; *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, 26 Labor Cases ¶ 68,671 (copied in full in Appendix, pp. 1-86).[2]

In *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. 2d 302, the Court said (p. 306):

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[2] Although petitioners allege that the case of *Order of Railroad Telegraphers* v. *N. O. T. & M. R. Co.*, C. A. 8 (1946), 156 F. 2d 1, is in conflict with the decisions cited above, a careful reading of that case will disclose that the court did not pass upon the notice question. In any event the Eighth Circuit has more recently held that notice and an opportunity to be heard must be given to all employees and unions involved in disputes before the Board in accordance with the requirements of Section 3, First (j) of the Act. *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2d 527, certiorari denied 340 U. S. 823, rehearing denied 340 U. S. 885. To the same effect is *Order of Railroad Telegraphers* v. *N. O. T. & M. Ry. Co.*, D. C. E. D. Mo. (1954), 26 Labor Cases ¶ 68,622.

> "We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees."

In *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1951), 188 F. 2d 294, the Court, in dealing with the question of "involved" employees before the Board, said (pp. 300-301):

> "In spite of adverse court rulings the Adjustment Board apparently persists in the practice of giving notice only to the named parties to a proceeding. In many cases such a notice is insufficient. We so held on the previous appeal of this case. * * * To say that the train porters are not involved in a dispute which may result in brakemen supplanting them in their jobs is so unrealistic as to be absurd. Surely the employee who has a certain job is as much interested in that job as another employee who is trying to take it away from him."

In *Brotherhood* v. *Pennsylvania R. Co.*, 107 F. Supp. 924, the United States District Court for the Western District of Pennsylvania had the following to say about who were "involved" employees (p. 927):

> "We, therefore, must examine the facts before us to determine if defendant's employees were and are involved in the dispute. *It is clear, and the cases so hold, that if A and B both want to perform the same job and the Board holds a hearing to determine which is entitled to perform the job both A and B are involved in the dispute and must receive notice of the hearing.*" (Emphasis supplied.)

Applying the letters used in the above quotation to the case at bar, "A" represents the Telegraphers and "B" represents D. A. Shears and the Clerks. Both want to perform the same work and the right to such work is the subject matter of the proceeding before the Board. The

application of the above statement of law to the instant case clearly shows that notice to D. A. Shears and the Clerks is required.

In *Estes* v. *Union Terminal Co.* (1937), 89 F. 2d 768, the Circuit Court of Appeals for the Fifth Circuit said (p. 770):

> "But in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. * * * The order of the Board required his dismissal. No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. * * * It is not necessary for an employee to be named as a party to the proceeding before the Board to be involved in the controversy within the meaning of the law."

In the recent case of *Allain* v. *National Railroad Adjustment Board,* N. D. Ill. (1953), 120 F. Supp. 453, affirmed (C. A. 7 1954) 212 F. 2d 32, the Department of Justice refused to represent the Board because of the Board's failure to give due notice (as in this case) (R. 24). The Department of Justice informed the Board, in part (R. 25):

> "It is thus clear that the courts have definitely determined that aggrieved individuals are entitled to notice in cases before the Adjustment Board, and that when such notice is not given, the Board's order is void. Since we think these decisions are entirely sound, we could not make a contrary contention on your behalf. We are not suggesting that you obtain private counsel in support of what we believe to be an erroneous and hopeless position. But if this Department appears on your behalf, it would necessarily confess error in the case."

That such construction of Section 3 First (j) is proper and that Congress intended notice to be served on *all*

"employees * * * involved in any dispute submitted" to the Board is patently shown by the legislative history of that Section. During the 1934 hearings on H. R. 7650 before the House Committee on Interstate and Foreign Commerce, 73rd Cong. 2nd Sess., the following colloquy occurred between Commissioner Eastman, the author of the bill, and Representative Kenney (p. 51):

> "Mr. Kenney. Mr. Eastman, a dispute of considerable importance might arise. Under this bill would all the labor unions, on any matter that might arise, have a right to be heard on the question?
>
> "Commissioner Eastman. You mean before the Adjustment Board?
>
> "Mr. Kenney. Yes. If a company union raised a question before the Board would the standard union also have the right to appear and be heard on the matter?
>
> "Commissioner Eastman. There is a special provision on page 16, paragraph (j):
>
> > "'Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.'
>
> "Mr. Kenney. They might not be directly involved, but the principle may affect them. Do you think this provision is broad enough to give the right to the standard union to appear in respect to that right before the Board on questions raised by the company union?
>
> "Commissioner Eastman. Well, I think that that is intended to be quite broad. These questions that come before the Adjustment Board relate to minor matters, to grievances and to interpretations of existing rules, and so on, and it would be my view that that paragraph [Section 3 First (j)] gives the parties the opportunity

to be heard in person, if they care to be heard, and by counsel, or by other representatives.

"Mr. Kenney. That is, from the various unions?

"Commissioner Eastman. Yes."

Petitioners argue, however, assuming notice must be served on the Clerks and D. A. Shears, that the Board can still serve such notice as that is one of the questions pending before the Board for decision (Br. 20). Petitioners should not now be heard to say that the Board (meaning the referee) can still decide the notice question when the labor members, including a vice-president of the Telegraphers, participated in forming a policy which excludes the referee from the consideration of that question (R. 20, 26, 29, 37). Moreover, such a contention is wholly unsound, because the Board has already decided not to give such notice (R. 42), and the requirement of notice is one of the ministerial duties imposed upon the Board, which duty must be met before the Board obtains jurisdiction. The language employed in Section 3 First (j) of the Railway Labor Act prescribes and defines this duty with such precision and certainty that nothing is left to the exercise of the Board's discretion or judgment. In other words, the duty is so plainly prescribed as to be a positive command to the Board, which command must be obeyed before jurisdiction is obtained over the merits of the case. *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2d 793, 799. It is not within the province of the Board to decide when or whether notice should be given to employees and unions involved in the dispute. Congress, by the enactment of Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)], has foreclosed the Board from withholding notice in such circumstances. If the Board refuses to comply with the positive mandate of Congress, then it is not only within the province of the Court but also

its duty to direct the Board to comply with the requirements of the statute, which are so clearly set forth as to be beyond dispute. As this Court stated in *Wilbur* v. *United States,* 281 U. S. 206, 218:

> "Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. * * * Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary."

We ask the Court to keep uppermost in mind that Illinois Central is not attempting to stay the ultimate determination of the merits by the Board but, on the contrary, is attempting to require the Board to follow the positive mandate of Congress in order that the Board may retain jurisdiction and issue a valid and binding award that will accord Illinois Central and all employees and unions involved in the dispute the protection to which they are entitled. It is obvious from the verified complaint (R. 26-33), as well as from the character of the remedy sought (R. 32), that the Court is not called upon to decide a controversy growing out of a duty performed by the Board under the Railway Labor Act. Rather does the controversy involve a refusal of the Board to discharge a substantive duty which the Railway Labor Act exacts.

Petitioners, throughout their brief, seek to leave the erroneous impression that in this case Illinois Central seeks to be relieved from overlapping contracts. Such is not the case. Illinois Central is only seeking to have the Board interpret, in one proceeding, the contracts of the Telegraphers and the Clerks in the light of each other, giving due regard to usage, custom and practice. Although Illinois Central contends the work in question is

plain, ordinary clerical work of the type customarily performed by clerical forces on its property and in the industry generally (R. 28), it is for the Board to decide which contract (if either) applies or whether they overlap.

The case initiated by the Telegraphers before the Board is the type of controversy which the National Railroad Adjustment Board was established to resolve once it obtains jurisdiction. However, in doing so, this Court has held that contracts must be read in the light of each other with "evidence as to usage, practice and custom * * * taken into account and properly understood." *Order of Conductors* v. *Pitney,* 326 U. S. 561, 567; *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239.

In *Order of Conductors* v. *Pitney,* 326 U. S. 561 (hereafter more fully discussed in this brief at pp. 64-65) this Court held that the National Railroad Adjustment Board is the tribunal designated by Congress to adjudicate a jurisdictional dispute involving a railroad and two labor unions claiming the same work under their respective contracts. After declaring that the Board is an agency "peculiarly competent to handle the basic question here involved" (p. 566) and "to interpret contracts such as these in order finally to settle a labor dispute" (p. 565) the Court emphasized the duties of the Board as follows (pp. 566-567):

> "* * * interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. (Citing cases.) For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood."

That this Court meant exactly what it said and has, in effect, passed upon the identical issue presented in this case is made crystal clear by denying the petition for rehearing filed in this Court by the Order of Railway Conductors on February 6, 1946. In its petition for rehearing, the Conductors' organization pointed out (pp. 2-5):

2 "The majority opinion has inadvertently failed to give consideration to the statutory limitations on the jurisdiction of the Adjustment Board.

"The Court has accorded the Board a more extensive jurisdiction than that granted to it by Congress. Congress limited the jurisdiction of the Board to disputes between carriers and employees and did not grant jurisdiction to the Board to hear and decide 'jurisdictional disputes' between *two* distinct crafts and classes of employees. In establishing the Board, Congress created a bi-partisan body, equally divided between representatives of management and labor."

* * *

3 "Obviously, Congress did not intend to establish a bi-partisan board and endow it with jurisdiction to determine 'jurisdictional disputes' fundamentally involving two different crafts and only incidentally involving management. Otherwise the balance of representation is broken and the advantages of a bi-partisan board are destroyed. If 'jurisdictional disputes' between two or more crafts were to be submitted to such a board, the labor representatives on the board would be split by their respective individual interests in the controversy and the carrier representatives would be inclined to remain united. The result would be that a group of employees, or their statutory representatives, aggrieved by carrier action in these circumstances, would be forced to submit the controversy to a division of the Adjustment Board one of whose labor members is hostile to its position, with the decision resting in the hands of the carrier members entirely. The advantage of balanced representation with submission of deadlocked cases to a neutral referee would

be destroyed and an instrument of oppression would be placed in the carrier's hands.

"There is no indication in the historical or legislative history[2] of the Railway Labor Act, or the terminology or statutory scheme of the Act, that Congress
4 intended this bi-partisan board to decide 'jurisdictional disputes' between two rival statutory representatives. The Act confers jurisdiction to decide disputes 'between an employee or group of employees *and* a carrier or carriers.' Disputes submitted to the Board are to be handled 'in the *usual* manner up to and including the chief operating officer of the carrier.' These are the 'minor disputes.' If unadjusted, *either* party 'may refer the disputes to the Adjustment Board.' The Act anticipates that deadlocks will likely result between carrier and labor members. Awards shall be binding 'upon both parties to the dispute.' Upon an award 'in favor of *the petitioner*, the division of the board shall make an order, *directed to the carrier.*'

"Throughout Section 3, the Act refers to *two* adversary parties—the employees on the one hand and the carrier on the other. No provision is made for the submission or decision of a tripartite dispute between two adversary crafts of employees and a carrier adversary to one craft or perhaps *neutral as between them.* Although no jurisdiction is granted to the Adjustment Board to decide 'jurisdictional disputes,' the majority opinion states:

" 'For ORC's agreement with the railroad must be read *in the light of others between the railroad and BRT.* And since *all* parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom that too must be taken into account and properly understood • • •. But the court should not have interpreted the con-

"2. The record on reargument in the *Elgin, Joliet and Eastern Railway Company* v. *Burley*, 327 U. S. 661, discloses the historical and legislative background of this section to which reference is hereby made."

tracts for the purposes of finally adjudicating *the disputes between the unions* and the railroad. The dismissal of the complaint should therefore be stayed by the District court, so as to give an opportunity for application to the Adjustment Board *for an interpretation of the agreements. Any* rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding.' (Emphasis supplied.)"

5 "The court imputes a far broader jurisdiction to the Adjustment Board than was granted to it in the Act."

With this information before it this Court, on February 11, 1946, denied the petition for rehearing (327 U. S. 814). In spite of the finality of the language of this Court in the *Pitney* case, a further dispute involving jurisdiction between the Telegraphers and the Clerks again reached this Court in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239. The nature of that dispute was stated by the Court as follows (p. 240):

> "A dispute arose between the two unions concerning the scope of their respective agreements. Each claimed for its members certain jobs in the railroad yards at Elmira, New York. The railroad agreed with the Clerks' Union. The chairman of Telegraphers protested, urging reassignment of the work to members of his union and claiming back pay on behalf of certain individual members."

After pointing out that the first declared purpose of the Railway Labor Act is to "avoid any interruption to commerce or to the operation of any carrier engaged therein" (Railway Labor Act, Sec. 2; 45 U. S. C. Sec. 151a(1)), the Court stated that this purpose "extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements" and that the "plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that

might be provocative of strikes" (p. 242). The Court then declared that "this type of grievance (contractual jurisdictional disputes) has long been considered a potent cause of friction leading to strikes"; that "it was to prevent such friction that the 1926 Act provided for creation of various Adjustment Boards by voluntary agreements between carriers and workers"; that, in 1934, this voluntary machinery was replaced by "a National Adjustment Board composed of representatives of railroads and unions"; that the 1934 Act "thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements"; and that "the Adjustment Board is well equipped to exercise its congressionally imposed functions" (pp. 242-243). Accordingly, this Court, following its decision in *Order of Conductors* v. *Pitney*, 326 U. S. 561, 566-567, denied the railroad company's right to a declaratory judgment, holding that "the jurisdiction of the Board to adjust grievances and disputes of the type involved is exclusive" (p. 244). In so doing, the Court said:

> "The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in *Order of Conductors* v. *Pitney*. There we held, in a case remarkably similar to the one before us now, that the federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents. * * *' Our ground for this holding was that the court 'should not have interpreted the contracts' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S. at pages 567-568." (*Slocum* case, pp. 243-244.)

The directions of this Court did not leave the Board free to take up contractual jurisdictional disputes piecemeal and to hear the Clerks and Telegraphers separately, as the Board would do in the instant case unless the decision of the Court below is affirmed.

That this Court had, in effect, again passed upon the identical issue raised in the instant case is graphically shown by the following excerpts from the brief for Marion J. Slocum, General Chairman, Lackawanna Division No. 30 of the Telegraphers, which was filed with this Court:

Page

2-3 "The petitioner in this case challenges a judgment of the Court of Appeals of the State of New York which affirmed actions of the lower courts of that State in entertaining jurisdiction to determine a controversy concerning the interpretation of collective bargaining agreements entered into pursuant to the provisions of the Railway Labor Act. * * * One of these agreements was between the respondent and The Order of Railroad Telegraphers, a railroad labor organization national in scope, of which the petitioner is an official; the other agreement was between the respondent and the Brotherhood of Railway and Steamship Clerks, a similar national railroad labor organization. * * *"

3 "The controversy involved a claim by petitioner's organization (Telegraphers) that certain work being performed by crew-callers in respondent's Elmira Yard fell within the scope rule of the telegraphers' agreement. On the other hand, the clerks' organization maintained that all work performed by said crew-callers came within the scope rule of their agreement."

4 "Respondent further alleged that a dispute existed between the telegraphers and the clerks as to whether the work performed by crew-callers came within the scope rules of the respective agreements."

* * *

"Respondent asked for an interpretation of all four agreements with the two organizations involved; as-

serted that its interpretation favored the clerks' organization; and requested the court to declare that all work performed by crew-callers came within the scope rule of the clerks' agreement."

4-5 "Respondent further alleged, upon information and belief, that if it recognized the claim of the telegraphers it would be subjected to a claim by the clerks who would present the same under the Railway Labor Act to the Third Division of the National Railway Adjustment Board (R. 11). Corresponding allegations were made as to assertion and recognition of a claim by the clerks in which event the telegraphers would present their claim under the Railway Labor Act to the Third Division of the Adjustment Board (R. 12). The basis upon which the respondent relied to sustain jurisdiction of the court to grant declaratory relief is set forth in Paragraph 30 of the complaint, wherein respondent alleged it had no adequate remedy at law, and no adequate remedy before the National Railroad Adjustment Board, since there was no procedure whereby respondent could bring claims jointly before the Third Division or any Division of the Adjustment Board for determinations, or whereby respondent could make both organizations parties thereto, so that both organizations would be bound by any decision of said Third Division (R. 13)."

7-8 "While the action was in form an action to interpret four written agreements, it developed upon the trial that no decision could be made on any such basis. The scope rule of none of the agreements defined the duties of the positions listed therein, and no court could possibly have interpreted these agreements to determine the controversy. It thus appeared that the true nature of the controversy was that of a jurisdictional dispute, *i. e.*, a dispute between two labor organizations as to the representation of particular employees performing a variety of duties mixed in nature. It was clearly demonstrated that substantial clerical duties were performed by these employees (R. 92, 106). On the other hand, it was shown by an overwhelming volume of testimony that the telegraphers had his-

torically represented all employees engaged in any form of communications work, even though the same employees performed incidental clerical work (R. 44), and it was not seriously disputed that a large portion of the crew-clerks' work was in this field (R. 72, *et seq.*)."

In his specification of errors, Slocum said:

12 "5. The Court of Appeals erred in its judgment that the procedure under the Railway Labor Act was inadequate to bind all of the parties."

In the summary of argument, it was stated:

13-14 "The administrative remedy, provided by federal statute, was specifically designed to resolve disputes such as the one here presented. * * *"

16 "It is important to note that a single Division, viz., the Third Division, has jurisdiction over both telegraphers and clerical employees * * *."

16 "The Act [45 USC, Section 153 First (i)] thus specifies a complete procedure for the handling of claims of this type."

29 "The present controversy is almost a prototype of the kind of case that is heard by the Railroad Adjustment Board every day. This tribunal is recognized by carriers and labor unions alike as the appropriate forum for the prompt and expert settlement of such controversies."

31 "The Railroad Adjustment Board is made up exclusively of practical railroad men drawn equally from management and labor. These men are informed by experience and have a complete familiarity with such controversies, which they hear every day."

In the concluding paragraph, Slocum said:

37 "This Court has found in the Act a wise rule of policy which remands carriers and labor organizations alike to the statutory procedures for the settlement of railroad labor controversies. No reason appears why this salutary rule, clearly stated in the *Pitney* case, should not be applied to proceedings in state and federal courts alike."

A clear and concise expression of the law on this point is also found in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. 2d 302. The subject matter of that suit was a series of awards involving the same work which had been rendered by the Board in separate proceedings filed first by the Clerks and then by the Telegraphers. The carrier took the position, as here, that binding and conclusive awards could be rendered only if notice had been given to all whose right might be affected. There, as here, the Board ignored the carrier's position and gave notice of hearing only to the organization filing the claim and the carrier against whom it was filed. In the Clerks' proceeding, the Board, with a referee sitting, found the Clerks' claims to be valid and ordered the work in question assigned to the Clerks. Some time later, in another and different proceeding, and with a different referee sitting, the Board sustained the claims of the Telegraphers to the same work involved in the previous Clerks' awards. In holding that it was the duty of the Board in the Telegraphers' cases to give notice to the Clerks and all employees involved, and in the Clerks' cases to give notice to the Telegraphers and all employees involved, and that the *carrier was entitled* in each case to have those duties performed, the Court of Appeals said (pp. 305-306):

> "The dilemma here posed results in large part from the refusal of the Board to bring both groups of claimants before it in one proceeding. Judging from a number of opinions accompanying awards and orders which were introduced as evidence in this cause, it appears to have been generally assumed that the Board has no authority under the Act to consider two agreements simultaneously, each in the light of the other. * * * We think logic and reason support the carrier's construction of § 3, First (j) which provides that the Board shall give due notice of all hearings 'to the employee or employees and the carrier or carriers in-

volved in any disputes submitted to them.' We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees.

"Obviously it is desirable to settle controversies such as these involving so-called 'overlapping contracts' on the basis of the existing contracts wherever possible instead of compelling resort to the machinery provided by § 6 for changing agreements. Of course this may not always be possible, but it is certainly much more likely to result if both parties to the dispute are brought before the Board with their respective agreements and each is considered in the light of the other, together with the usage, practice and customs of the industry, or of the particular carrier. And we think the case, *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318, supports this view. That case also involved a dispute between two groups of employees, both of whom claimed the same jobs by virtue of the agreement of each with the carrier. There the Supreme Court upheld the function of the Adjustment Board to resolve the conflict, but indicated that in doing so, the Board must consider both agreements together, stating 326 U. S. at page 567, 66 S. Ct. at page 325, 'O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood'."

Petitioners urge (p. 22) that the holding of the lower Court "has utterly frustrated the operation of the Railway Labor Act with respect to claims presented to the Board in which the carrier makes the contention that notice to others than the claimant and the carrier is required."

In view of this startling indictment, we feel certain that this Court will be quite interested to know that the Telegraphers themselves sought to participate in the Clerks'

claims which were involved in the case of *Missouri-Kansas-Texas R. Co. v. N. R. A. B.*, N. D. Ill. (1954), 26 Labor Cases, ¶ 68,671 (copied in full in Appendix) and we believe this Court will also be interested to read the following finding made by the District Court for the Northern District of Illinois on September 2, 1954, in support of its mandatory permanent injunction ordering the Board to give the kind of notice which the *Pitney* and *Slocum* cases say it is the duty of the Board to give:

> "66. By letter dated November 29, 1943, V. O. Gardner, President of ORT, informed the Board that certain employees of MKT represented by ORT were involved in the dispute filed with the Board by BRC; that those employees had expressed themselves as being materially affected by the outcome of that dispute; that they had signified a desire to present their interest before the Board when hearings were held or other adjudicatory action was taken on BRC's claim; that said employees desired to be represented before the Board by ORT, through its duly accredited officers or agents; that there were parties other than the claimant and MKT who were interested and involved in the dispute and who would be affected by an award; and Gardner expressed a desire to be notified promptly of any action by the Board so that ample opportunity would be afforded such employees or their representatives to participate in any hearings or deliberations which might be conducted by the Board.
>
> "Gardner enclosed with his letter of November 29, 1943, separate letters dated November 20, 1943, each addressed to the Board by G. M. Singletary, J. C. Parks, and E. Dowdy, who held the positions of Agent-Yardmaster, Telegrapher-Cashier, and Telegrapher-Clerk, respectively, for MKT at Altus, Oklahoma. Each of those letters quoted BRC's claim, as set forth in Finding 65, then pending before the Board, and each letter concluded with the following three paragraphs:
>
> > 'I am involved in this dispute for the reason that I am one of the employees referred to in the above

claim, and I consider that my interests and rights will be adversely affected and placed in jeopardy if this claim should be sustained.

'I therefore respectfully request a hearing as provided for by the Railway Labor Act, which procedure is in accord with an opinion given on the subject by the Attorney General of the United States.

'Being unable to appear in person before your Division, I hereby authorize The Order of Railroad Telegraphers, its officers or agents, to act as my duly accredited representative at any or all hearings on said claim. I delegate to The Order of Railroad Telegraphers full authority to appear thereat as my counsel and file briefs in my behalf.' " (Appendix p. 23.)

It was only after the Telegraphers and the Clerks agreed between themselves that each organization should bring individual claims against a carrier so that each might obtain a favorable award without notice being given to the other, that the Telegraphers advanced the argument presented in their brief. This is shown by finding 64 in the Missouri-Kansas-Texas Case (68 Labor Cases ¶ 68,671):

"ORT regained its place on the Board in 1949, after subscribing to BRC's program for Board procedure and joining BRC and other labor organizations in the following agreement:

'The Chief Executives of the organizations which take cases to the Third Division agreed that any disputes brought to that Division would be supported by the Labor representatives on that Division, provided the provisions of the agreement of the organization submitting the claim did sustain the position taken by the organization. It was further agreed that in the event the application of a sustaining award would result in a violation of the rules of another agreement, the second organization could also bring a claim to the Third Division to correct such violation and in the event

> the rules of the agreement involved supported the claim all of the Labor Members of the Board would support that claim. In other words the decision of the Labor Members on the Board would be based upon the rules in the agreement of the Organization bringing the claim and they would vote to sustain the claim if supported by the rules of the agreement involved or to deny the claim if not supported by the rules of the agreement involved which is the intent and purpose of the Railway Labor Act.'
>
> "This was the same procedural program previously advocated by BRC and which the labor members of the Board followed from July, 1942 to September, 1949, during which period there was no ORT representative on the Board." (Appendix p. 21.)

Contrary to Petitioners' argument, it is the Board itself which is frustrating the operation of the Railway Labor Act by its failure to serve the notice required by the statute. This subject is discussed more at length at pp. 65-67. The following language of this Court in *Order of Conductors* v. *Swan,* 329 U. S. 520, 524, is particularly applicable to the Board's failure to comply with the statute in this case:

> "We are dealing here with something quite different from an administrative determination which Congress has made final and beyond the realm of judicial scrutiny. We are dealing with a jurisdictional frustration on an administrative level, making impossible the issuance of administrative orders which Congress explicitly has opened to review by the courts. Until that basic jurisdictional controversy is settled, the procedure contemplated by § 3 of the Railway Labor Act remains a dead letter so far as yardmasters are concerned and the statutory rights of such persons become atrophied. A declaratory judgment action is therefore appropriate to remove such an administrative stagnation."

Petitioners further state that prior to the decision below in this case, when the labor members and the carrier members of the Board deadlocked on a carrier contention that notice was required to other than the claimants and the carriers, a referee was appointed pursuant to Section 3 First (l) of the Railway Labor Act to sit with the Board as a member and decide the case (Br. 22) and that if referees were able to resolve such disputes the courts should not interfere (Br. 23). Petitioners cite numerous awards which they claim support their contention that referees have been appointed to decide the notice question. A detailed examination of those awards reveals, however, that in all of the awards cited, a referee was appointed by the National Mediation Board to decide the dispute on the merits alone.

In any event such claims before the Board were only resolved by creating additional disputes. The legislative history of the Railway Labor Act shows a consistent purpose to establish and maintain a system for the peaceful and final adjustment of disputes. It is inconceivable, in view of the stated purposes of the Act [45 U. S. C. 151a (4), (5)], that Congress intended the Board should settle one dispute by creating another. The Telegraphers organization itself has expressed this view through W. C. Thompson, its General Chairman on the M-K-T Lines, as shown by finding 127 in *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, N. D. Ill. (1954), 26 Labor Cases, ¶ 68,671 (Appendix, p. 44). That finding incorporates excerpts from a letter written by Mr. Thompson, the second quoted paragraph of which reads in part:

> "I am certain that Mr. Douglas, the referee [in awards 3932, 3933 and 3934], or any member of the Board, cannot and will not say that Congress in enacting the Labor Act, intended to create another dispute

through the National Railroad Adjustment Board in disposing of one and that is what Awards 3932, 3933, and 3934 actually accomplish."

The manner in which the Board's interpretation and application of the Act has worked is graphically shown by the history of Awards 3932, 3933 and 3934 cited in Petitioners' brief (p. 22). The claim involved in Award 3932 was first presented to the Board on October 11, 1943 and resulted in Award 2597. The claims involved in Awards 3933 and 3934 were first presented to the Board on June 29, 1944 and resulted in Awards 2650 and 2651. These claims, filed by the Clerks, asked the Board to order the Missouri-Kansas-Texas Railroad Company to transfer certain work done by telegraphers to clerks and to compensate the clerks for money losses. The telegraphers and three individual members of the telegraphers requested the Board to give them notice of the hearing and an opportunity to be heard in the proceeding which resulted in Award 2597. The Board "deadlocked on the issue of giving notice to persons or organizations, other than parties to the disputes [claimant union and carrier], whose interest may be affected by awards on the merits." The carrier members took "the position that binding and conclusive awards can be rendered only after notice [is] given to all whose rights may be involved." The Board, with referee Bruce Blake sitting as a member, on March 16, 1944, decided that the case should be set down for hearing on the merits, without notice to anyone except those parties named in the dispute (claimant union and carrier). Accordingly, notice of the hearing was given to the Clerks and M-K-T, but no notice was given to the Telegraphers and the three individual members. After a hearing on the merits the Board, with referee Bruce Blake sitting as a member, on June 1, 1944, rendered Award 2597. The

Board adhered to its former decision that notice of hearing should be given only to parties named in the dispute [Clerks and M-K-T] but the Board in accordance with its decision in Award 2596 dismissed the case without prejudice because: (1) The Telegraphers had a vital interest in the outcome of the dispute, (2) to sustain the claim would deprive the Telegraphers and their members of most substantial and valuable rights, and (3) to deprive them of such rights without giving them an opportunity to be heard would be subversive of democratic principles and processes.

On July 31, 1944, the Clerks requested the Board's permission to withdraw the other two cases. This permission was granted and on August 2, 1944 those cases were dismissed by Awards 2650 and 2651.

On April 17, 1947, the Clerks submitted to the Board the identical claims covered by previous Awards 2597, 2650 and 2651. In its submissions to the Board in each of those claims, M-K-T called the Board's attention to the previous awards, to the reasons given by the Board for dismissing the claim covered by Award 2597, and called the Board's attention to the absence of the Telegraphers, in these words:

> "This claim * * * has not made and does not contemplate making The Order of Railroad Telegraphers a party to the action, but rather seeks to exclude that organization.
>
> "No notice is given to a party to be affected. No opportunity is given such party to be heard and present every available defense."

Despite the position of M-K-T that notice should be given to the Telegraphers, the Board gave notice of the hearings only to the Clerks and M-K-T.

On June 10, 1948, the Board, with referee James A. Douglas sitting as a member thereof, rendered Awards

3932, 3933 and 3934 sustaining the claims of the clerks, except for the demand for money losses.

These awards and the disputes underlying them are still in litigation, with resulting unrest among those employees of M-K-T who are represented by the Clerks and Telegraphers. *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, D. C. N. D. Ill. (1954), 26 Labor Cases ¶ 68,671, Findings 65-104, 163, Appendix pp. 22-37, 58.

Another example of how the Board's interpretation and application of the Act has "worked" is shown by the history of the claims filed over 15 years ago by trainmen on the Santa Fe in which they alleged the right (under their agreement) to do work which was being performed by "express messengers" of the Railway Express Agency. In 1942, without giving any notice to those messengers and without their being heard before the Board, five awards (Nos. 6635-6639) were rendered sustaining the claims. In 1944 the railroad made a supplemental agreement with the trainmen implementing the awards, took the messengers off the trains and put the trainmen on to do all the work which the displaced messengers once handled. In 1949 the District Court for the Western District of Missouri set the awards aside and declared the supplemental agreement void. The decision was affirmed by the Eighth Circuit (1950). This Court denied certiorari and denied rehearing. In 1954 the five dockets of the Board were ordered reopened, pursuant to mandate in accordance with the decision of the Seventh Circuit in *Brotherhood of Railroad Trainmen* v. *Swan*, 214 F. (2d) 56. Such action, now being taken, could have been effected in 1939 when the Board docketed the claims, by the simple expedient of following the requirements of the Act.

Still another example of how the Board's interpretation of the notice requirement "works" is the claim filed in 1939 by trainmen on the Santa Fe railroad for the right

to do "head-end" work. The Board heard the claim without notifying or hearing the train porters who were, and for many years had been, doing that work. The Board issued an award (No. 6640) sustaining the claim. That award has been held void for want of due notice under Section 3 First (j) of the Railway Labor Act. The case has been before the Seventh Circuit twice and is now back on the trial court's docket.

Thus, it can not be seriously contended that the Board's interpretation and application of the Act has "worked" in view of the fact that claims and their underlying disputes remain unresolved twelve and fifteen years after their original submission, all because of the labor members' and collective bargaining representatives' refusal to follow Section 3 First (j).

Petitioners further urge that if the administrative process in this type of case is to function as intended, with the courts not deciding issues presented to the Board—at least until after the Board has decided them, the decision of the lower court should be reversed (Br. 24). This argument again emphasizes the persistent and consistent refusal of Petitioners to recognize the true nature of this case and to deal with it accordingly. Their purpose is clear. They wish to divert the Court's attention from the primary relief sought by Illinois Central, namely, a judgment requiring the Board to comply with Section 3 First (j) of the Railway Labor Act, *i. e.*, to give the Clerks and all employees involved due and timely notice of the hearing on the claim instituted by the Telegraphers. The Court is not called upon to decide the "issues presented to the Board". It is merely called upon to require the Board to proceed in such a way that the Board's decision of the issues will be valid. Only in this way can there be a final settlement of the dispute. Instead of circumventing the Railway Labor Act, Illinois Central is asking this Court to compel the Board to obey that statute in accordance with

the decisions of this Court in the *Pitney* and *Slocum* cases. The objective of Illinois Central is inside—not outside—the law. It seeks the rights which the Railway Labor Act affords it and it asks the Court to compel the Board to obey the mandate of Congress.

IV.

"ACTUAL NOTICE" DOES NOT MEET THE REQUIREMENTS OF DUE PROCESS IN VIEW OF THE FACT THAT BOARD DOES NOT PERMIT PERSONS HAVING "ACTUAL NOTICE" TO PARTICIPATE IN PROCEEDINGS BEFORE THE BOARD.

Telegraphers argue (Br. 38-41) that actual notice of the proceeding before the Board is sufficient. This argument, however, loses all force in view of the facts: (1) there is no showing in the record that Shears, the employee doing the work claimed by the Telegraphers, has actual notice of the proceeding before the Board (R. 37); (2) the record shows that Shears, even if he had "actual notice" would not be permitted to appear and participate in the hearing before the Board (R. 25-26); and (3) the record shows that the Clerks, the union representing Shears, would not be permitted to appear and participate in the hearing before the Board (R. 25-26).

Petitioners' statement that "we know from the record that the Clerks do not desire to appear" (Br. 40) is not warranted from the facts of record. Furthermore, whether the Clerks "desire to appear" is immaterial. The statute requires that notice be given to employees and their unions involved in disputes before the Board. This must be done whether those employees and unions desire to appear or not, in order that the Board may render valid and binding awards. Clearly, the Clerks are "involved" in the proceeding before the Board, as a matter of law. The purpose of the notice required by the Act is to assure

the guarantee of due process of law to the carrier, to each employee, and each union involved in a dispute before the Board. This means that each essential element must be present: that is, notice, opportunity to be heard or defend, a competent tribunal and an orderly proceeding in accordance with established rules which do not violate fundamental rights. *16 C. J. S., Constitutional Law, Sec. 569 (2), pp. 1153-1155.*

In support of their argument that actual notice is sufficient, Petitioners cite (Br. 38): *Estes* v. *Union Terminal Co.*, C. A. 5 (1937), 89 F. 2d 768; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1951), 188 F. 2d 294, certiorari denied 342 U. S. 819; and *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2d 793. Those cases were decided before it was established that the Board will only hear persons who have received formal notice from it (R. 25-26, 38). Moreover, in those cases the courts recognized that those receiving actual notice should be allowed to participate in the proceeding and assumed that such persons would be afforded that right by the Board.[3] For example, in the *Kirby* case the Court stated (188 F. 2d 798) that employees involved "are entitled to notice and an opportunity to be heard before the Adjustment Board." Similar statements are found in the *Estes* case (89 F. 2d 768, 770, 771) and the *Hunter* case (188 F. 2d 294, 301).

The purpose of notice is not only to afford "involved" persons an opportunity to participate in a proceeding should they so desire, but is also to protect the constitu-

3. See also: *Elgin J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 736, 746; *Elgin, J. & E. R. Co.* v. *Burley*, 327 U. S. 661, 662, 666; *Nord* v. *Griffin*, C. A. 7 (1936), 86 F. 2d 481, 484, certiorari denied, 300 U. S. 673; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. 2d 302, 306; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1948), 171 F. 2d 594, 598, certiorari denied, 337 U. S. 916.

tional rights of the carrier, to make certain there is due process of law in the Board's proceedings, to protect all employees and unions involved in disputes, and to insure that an award when finally entered, after prolonged and expensive litigation, will be a valid award upon which all interested parties may rely for protection. Accordingly, it is apparent Illinois Central is entitled to have the Board give notice and an opportunity to appear to D. A. Shears and the Clerks. *67 C. J. S., Parties, Sec. 74, c(1), pp. 1027-1028.*

Only recently have the courts been informed that the Board, with conscious indifference and complete disregard for the numerous decisions of the federal courts, has effectuated a custom and practice of denying persons having "actual notice" the right to participate in proceedings before it. One of the first cases to consider this question was *Allain* v. *Tummon*, C. A. 7 (1954), 212 F. 2d 32. In that case, the Court held the "actual notice" rule should be abandoned in view of such policy of the Board. In this connection, the Court said (pp. 35-36):

> "It was established herein that had the plaintiffs or their union obtained the knowledge that the claim of the dining car stewards was pending before the Board, they would not have been permitted to file a written submission, offer testimony, cross-examine witnesses, make an argument, or otherwise participate in the hearing. It is thus apparent that a statement in our opinion in the second *Hunter* case is no longer applicable. In that case we said, 188 F. 2d 294, 301: 'We hold that all plaintiffs who were or could be adversely affected by the order and award were entitled to notice under the statute. Actual notice of the hearings for sufficient period prior thereto to permit plaintiffs to be present and to be heard is all that is required. This is a proceeding in equity and any plaintiff who had actual notice of the hearings, or authorized the Santa Fe to represent him thereat, is estopped

> from relying on the Board's failure to serve forma notice thereof upon him.'
>
> "Although we indicated in that opinion that actua notice of the hearing for a sufficient period prior there to to permit plaintiffs to be present and to be heard was sufficient, it now appears that actual notice to the plaintiffs or their union would have availed them noth ing. Notice without the opportunity to be heard does not satisfy the requirements of due process."

Similarly, in dealing with that question in this case, the Court below said (R. 55):

> "Of more importance, however, is the fact tha actual notice would have served no purpose insofa as it afforded protection to the Clerks or Shears o either their statutory or constitutional right to be heard because, as the record plainly shows, the Board would not have permitted them to be heard with tha kind of notice. A hearing would have been allowed only to those receiving formal notice. Such being the situation, the Board cannot hide behind the pretext that actual notice is sufficient and at the same time say that only those given formal notice will be heard.' 212 F. (2d) 29.

These later decisions are bottomed on principles which are the foundation of our form of government. An award and order made under circumstances where employees and their unions are adversely affected and have not been accorded an opportunity to participate in a hearing, even though they had received "actual notice" of the proceeding, is a denial of due process of law, for the fundamental requisite of due process of law is the opportunity to be heard. *In re Central Railroad Co. of New Jersey*, C. A. 3 (1942), 136 F. 2d 633, 639, certiorari denied 320 U. S. 805; *Grannis* v. *Ordean*, 234 U. S. 385, 394; *N. Y.* v. *New York N. H. & H. R. Co.*, 344 U. S. 293, 297; *Merrill on Notice*, 1st Edition (1952), Volume 1, Chap. 11, Sec. 512, page 498

V.

THE DISTRICT COURT PROPERLY TOOK JURISDICTION OF THE PROCEEDING.

Petitioners misconceive the nature of this action; hence their propositions, arguments and authorities have no bearing upon the real issue in this case. Petitioners have devoted a large part of their brief to a challenge to the jurisdiction of the District Court (Br. 9-21). As subdivisions under this section of their argument, Petitioners assert that the District Court does not have jurisdiction because the railroad has not exhausted its administrative remedies (Br. 9-13); that the action is premature because the Board's decision might be in accord with the railroad's contentions (Br. 13-16); and that the District Court lacks jurisdiction of the subject-matter because the judicial remedy specified by the Railway Labor Act for challenging the validity of an award is exclusive (Br. 16-21).

Throughout these sections of their arguments and, in fact, throughout their entire brief, Petitioners persistently refuse to recognize the true nature of this case. Petitioners labor to impress this Court with the erroneous assumption that the action of the Court below was an interference with the valid process of the Board and that, in effect, the District Court has substituted its judgment for that of the Board in connection with the subject matter of the claim pending before the Board. Such assumption is completely without merit. All that Illinois Central is seeking is to have notice served in accordance with the requirements of Section 3 First (j) of the Railway Labor Act [45 U. S. C. Section 153 First (j)] and the decisions of the federal courts[4] in order that the Board may issue a valid award.

4. See: *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. (2d) 302; *Hunter* v. *Atchi-*

A. Exhaustion of Administrative Remedies Rule Is Inapplicable Where, as Here, Defect Urged Goes to the Jurisdiction of the Administrative Agency.

The contention that the District Court lacks jurisdiction because Illinois Central has not exhausted its administrative remedies (Br. 9-13) is not well-founded. Illinois Central is not attempting to have the Court review preliminary and procedural matters which are discretionary with the Board, but rather is attempting to compel the Board to comply with substantive and mandatory provisions of the Railway Labor Act. Petitioners cite as authority for their assertion that judicial intervention is not warranted at this time: *Ashcraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Myers* v. *Bethlehem Ship Building Corp.*, 303 U. S. 41; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540; *Jonco Aircraft Corp* v. *Franklin*, 346 U. S. 11; and other cases in which the complainants attempted to stay a determination by the governmental agency involved. Illinois Central is not attempting to stay the ultimate determination of the merits of this case by the Board. It is attempting to require the Board to follow the mandate of Congress in order that the Board's jurisdiction may be retained, and a valid and binding award issued which will give Illinois Central and all employees and unions involved in the dispute before the Board the protection to which they are entitled. That compliance with

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son; *Topeka & Santa Fe R. Co.*, C. A. 7 (1951), 188 F. (2d) 294, cert. den., 342 U. S. 819; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. (2d) 527; cert. den., 340 U. S. 832; *Allain* v. *Tummon*, C. A. 7 (1954), 212 F. (2d) 32; *Nord* v. *Griffin*, 86 F. 2d 481, cert. den., 300 U. S. 673; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, 171 F. 2d 594, cert. den., 337 U. S. 916; *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, 26 Labor Cases ¶ 68,671; *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2d 793.

jurisdictional requirements is not a preliminary and procedural matter, within the meaning of the rule requiring that administrative remedies first be exhausted before resort is had to the courts, is clearly shown by the language of this Court in *Kansas City So. Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178. In that case the Interstate Commerce Commission had refused to make certain valuations required by the Interstate Commerce Act on the ground that compliance with the statute involved consideration by the Commission of matters beyond the possibility of rational determination and called for inadmissible assumptions. Suit was brought to compel the Commission to hear proof as to the valuation required and to act upon it. The Court stated the issue as follows (p. 187):

> "* * * the issue before us is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command."

This is exactly the issue in the instant case. Section 3 First (j) directly and expressly requires that notice be served upon all employees involved in a proceeding before the Board. The Board has unequivocally refused to obey such command. In the *Kansas City* case, the Court in resolving the issue said (p. 188):

> "Finally, even, if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of the opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent

thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise."

The case of *Skinner & Eddy* v. *United States*, 249 U. S. 557, is also pertinent. In that case the Government contended that the District Court did not have jurisdiction to grant relief from an Interstate Commerce Commission rate increase because the plaintiff had not exhausted its remedies before the Commission. In holding that the District Court properly assumed jurisdiction, this Court, by Mr. Justice Brandeis, stated (pp. 562-563):

> "The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49; *Louisiana & Pacific Ry. Co.* v. *United States*, 209 Fed. Rep. 244, 251; *Atlantic Coast Line R. R. Co.* v. *Interstate Commerce Commission*, 194 Fed. Rep. 449, 451. The *Sacramento* Case, *supra*, was a case of this character. Compare *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433. The District Court properly assumed jurisdiction of this suit."

The case of *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474, is also in point. It involved the question whether Alaska is a territory of the United States within the meaning of the Interstate Commerce Act so as to permit a Steamship Company to institute an action before the Interstate Commerce Commission alleging violations of the Act by a railway operating in Alaska. The Commission resolved the question in the

negative and dismissed the petition of the Humboldt Company. Suit was then brought in the Supreme Court of the District of Columbia praying for a writ of mandamus against the Commission to require it to take jurisdiction, which proceeding was dismissed. The Court of Appeals reversed and remanded with directions to issue a peremptory writ of mandamus requiring the Commission to take jurisdiction. On appeal, this Court said (p. 484):

> "The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. It is true there may be a jurisdiction to determine the possession of jurisdiction. *Ex Parte Harding*, 219 U. S. 363. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined and, in the main, explicitly directed by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its non-action be reviewed?"

The same question presents itself in this proceeding. If the Board nullifies its duties by rendering an award which is void for lack of jurisdiction or want of due process, how can the carrier involved review such action? The answer of the Telegraphers is that the carrier must wait until the party in whose favor the award is rendered at-

tempts to enforce it through the courts. This, however, completely overlooks the fact that in many cases the organizations in whose favor the awards are rendered do not attempt to enforce the awards through the courts, but instead enforce them through the use of their economic strength, *i.e.*, strike threats [Nineteenth Annual Report of the National Mediation Board for the year ended June 30, 1953, p. 23, lines 8-10; *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, D. C. N. D. Ill. (1954) 26 Labor Cases ¶68,671, Finding 111], thereby eliminating any possibility of judicial review by the carrier. Inasmuch as there is no provision in the Railway Labor Act which affords a carrier a review of an award of the Board as a matter of right, Illinois Central is entitled to relief against the deliberate refusal of the Board to give the notice required by Section 3 First (j) of the Act, for its very purpose as defined by the Act is to render an award that is valid. Moreover, under such circumstances the courts cannot be said to be without the power to require the Board to comply with the command of Congress. *Wilbur* v. *United States*, 281 U. S. 206.

The federal courts have, on numerous other occasions, recognized that the rule requiring the exhaustion of administrative remedies is not iron-clad and has no application where the defect urged goes to the jurisdiction of the administrative agency. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638; *United States ex rel. De Lucia* v. *O'Donovan*, C. A. 7 (1950), 178 F. 2d 876, cert. den., 340 U. S. 866.

B. The Action Is Not Premature.

Petitioners further urge that there is no case or controversy because the Board's decision may be in accord with the railroad's position (Br. 13-16). There is no merit in this contention whatsoever. Section 3 First (j) of the Rail-

way Labor Act requires the Board to serve notice upon employees and their unions involved in disputes before it. The Board has refused to follow this mandate of the statute (R. 19-20, 29, 37). As previously pointed out (pp. 52-56), where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus. The very fact that the Board has refused to comply with the statute and that such refusal is a denial of Illinois Central's right to have the contract of the Telegraphers construed in the light of the Clerks' agreement and with due regard to the usage, practice and custom, in itself proves a case or controversy requiring the exercise of judicial power. Vom Bauer's Federal Administrative Law, Volume 2, Section 698, p. 673.

This Court spelled out the meaning of a "case or controversy" in *In Re Summers*, 325 U. S. 561, as follows (pp. 566-567):

> "A case arises, within the meaning of the Constitution when any question respecting the Constitution, treaties or laws of the United States has assumed 'such a form that the judicial power is capable of acting on it'. * * * A declaration on rights as they stand must be sought, not on rights which may arise in the future, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, and there must be an actual controversy over an issue, not a desire for an abstract declaration of the law. *Muskrat* v. *United States*, 219 U. S. 346, 361; *Fairchild* v. *Hughes*, 258 U. S. 126, 129. The form of the proceeding is not significant. It is the nature and effect which is controlling. *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 259."

The instant case meets each of these requirements. Judicial power is capable of acting with respect to the Railway Labor Act and indeed is required if the mandate of Congress is to be followed. Illinois Central seeks a declaration on rights as they stand. The Board has not given the notice required although requested to do so (R. 19-20, 29, 37) and there is an actual controversy over the issue.

The cases cited by Petitioners (Br. 14) that administrative proceedings may not be enjoined have no application. Illinois Central is not attempting to enjoin this proceeding but is merely attempting to require the Board to comply with the statute so that a valid award may be issued (R. 56).

C. Enforcement Suit Under Section 3 First (p) of the Railway Labor Act Is Neither an Exclusive Nor an Adequate Remedy.

Petitioners claim (Br. 17-21) that when the Board fails to give due notice the only remedy available to the carrier is to defend an enforcement suit under Section 3 First (p) of the Railway Labor Act [45 U. S. C. Section 153 (p)]. This argument is completely beside the point because no award has been rendered. The sole purpose of this case is to secure the service of the notice required by Section 3 First (j) of the Act so that a valid award can be rendered.

In *Miguel* v. *McCarl*, 291 U. S. 442, this Court had occasion to consider a contention similar to that advanced by Petitioners herein. In that case the petitioner sought to require the payment of allowances due as retirement pay from the Army. One of the defenses to the action was that the petitioner in that case had a remedy at law in the Court of Claims for his retirement pay. The Court

first disposed of the right to a mandamus action as follows (p. 454):

> "In this situation the duty * * * 'is so plainly prescribed as to be free from doubt and equivalent to a positive command,' and, therefore, is 'so far ministerial that its performance may be compelled by mandamus.'"

And with respect to the contention that there was an adequate remedy at law, this Court said (p. 455):

> "We find no merit in the contention * * * that the suit cannot be maintained because petitioner has a remedy at law in the court of claims for his retired pay. *Smith* v. *Jackson*, 246 U. S. 388; 241 Fed. 747, 760."

In any event, Petitioners' contention that an enforcement suit provides an adequate remedy is without foundation in fact. Defending an enforcement suit would not result in the serving of notice but would merely invalidate the award. *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2d 527, 534; *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2d 793, 799. Thus, the basic controversy would remain undetermined after a great expenditure of money, time and effort. Moreover, there would be no way in which the mandate of Congress could be enforced for the Board has persisted and continues to persist in its refusal to serve the requisite notice (R. 19-20, 25-26, 29, 37). Inasmuch as the Telegraphers are "Petitioners" in the proceeding before the Board, Illinois Central would have no opportunity for review of an award unless and until a proceeding was brought by the Telegraphers to enforce such award. [45 U. S. C. 153 First (p)]. However, labor organizations have often foregone "judicial enforcement" of an award, whereby the carrier may obtain court review, in favor of "economic enforcement," whereby the carrier has no opportunity for court review. See, *e. g.*,

Finding 111, append. 40, in *Missouri-Kansas-Texas R.* Paragraph 68,671, Nineteenth Annual Report of the National Mediation Board for the year ended June 30, 1953, page 23, lines 8-10.

Furthermore, if Illinois Central is before the Board with only the Telegraphers, a referee will decide that claim. If such an award is adverse to Illinois Central and it complies therewith, an additional dispute is thereby created with the Clerks. A claim of the Clerks will then be presented to the Board with only the Clerks and Illinois Central before it and that claim would be decided by a different referee. Thus, at no time would a single referee have the benefit of the evidence and argument of Illinois Central and all employees and unions involved in the dispute, as this Court intended by its decisions in the *Pitney* and *Slocum* cases.

If the Board renders an award in favor of the Telegraphers and the Telegraphers sue on that award, Illinois Central would not be permitted to implead the Clerks. Conversely, if the Board renders an award in favor of the Clerks and the Clerks sue on that award, Illinois Central would not be permitted to implead the Telegraphers. See *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, 26 Labor Cases ¶ 68,671, Finding 165, append. 58. Thus, the Court in the enforcement actions would not have before it all of the parties to the dispute and would never have presented to it by the respective parties all of the facts relating to such dispute as it was contemplated should be done in the *Pitney* and *Slocum* cases.

Accordingly, if mandamus is not available to Illinois Central, it, in effect, has no remedy.

Telegraphers' claim before the Board seeks, among other things, back wages from the date of the alleged violation of their agreement. A final award on the present record would be void due to the failure of the Board to comply with Section 3 First (j) of the Railway

Labor Act, but if there is merit in the Telegraphers' claim, the wilful failure of the Board to follow the jurisdictional mandate of the statute will delay the ultimate decision and the period during which Illinois Central is subjected to the possible obligation of double payments for one position. This period could be further prolonged by the failure of the Telegraphers to seek enforcement of a subsequent valid award for a two-year period after its entry as provided by Section 3 First (q) of the Act [45 U. S. C. Section 153 First (q)].

In the event the Board proceeded on the present state of the record and rendered an award adverse to Illinois Central, the carrier would be obliged, at its peril, either to comply with the award and displace Shears or to continue Shears in his position in defiance of said award and refuse to employ a member of the Telegraphers, either of which courses would be certain to result in litigation by the employee refused employment, and a void award would afford absolutely no protection as against such multifarious litigation. Or, again, the Telegraphers might avoid attempting to enforce such an award through the courts and resort to enforcement by economic strength, thereby denying plaintiff any right to review.

Illinois Central has already been advised in writing by the Clerks that that organization considers the work in question to be properly within the scope of their agreement and that the Clerks will prosecute a claim for said work before the Board in the event Illinois Central gives the work to the Telegraphers (R. 30-31) pursuant to an award in favor of that organization. This fact was made known to the Board (R. 18) but in spite of such knowledge it persists in its refusal to serve the required notice. Under these conditions and irrespective of the validity of any award of the Board concerning the work at Palestine, Illinois Central is faced with additional, vexatious, costly and independent

claims by a separate and distinct organization and employee for the same work, losses of compensation and employment, and with suits for enforcement of such awards as may be obtained. This could and should be avoided if the Board gives formal notice as required by statute and permits all employees and unions involved in the dispute to participate in the proceedings before the Board. *Order of Conductors* v. *Pitney*, 326 U. S. 561; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. 2d 302.

The Court below recognized these facts for it stated (R. 54-55):

> "We conclude that the court had jurisdiction and that the action was not premature. Closely aligned with these issues and partly covered by our discussion relative thereto is the contention that in any event the Carrier has no standing to institute such an action because it has shown no harm or damage and may never be able to do so, depending upon the decision which the Board makes on the merits. We think this contention is without merit. The Carrier has been involuntarily brought into the proceeding by action of the Board. In order to protect its rights and property, it must resist the Telegraphers' claim by participating in the proceeding. To do so it must expend time, labor and money in a fruitless effort to protect itself from a potential award rendered in a proceeding in which the Board is without jurisdiction. Moreover, the Carrier is threatened not only with an abortive proceeding [by the Telegraphers] before the Board but [also one] by the Clerks in an action concerning the same employment rights."

We earnestly submit that it is completely illogical to argue that Illinois Central will not be damaged if the Board, on the present record, proceeds to enter an award which is neither final, binding nor enforceable.

Petitioners state (Br. 16) that "it is, of course, the normal rule that where Congress has specified a particular administrative or judicial procedure, such procedure is exclusive." Illinois Central does not question this principle of law, but it does not mean that if the Board refuses to follow the procedure prescribed by Congress the courts cannot compel it to do so.

It is absurd to argue that although Congress has specified a ministerial duty as here, there is no way to enforce compliance. Certainly no inference can be drawn from the cases cited by Petitioners. In the cases of *Washington Terminal Co.* v. *Boswell*, D. C. Circuit (1941), 124 F. 2d 235, affirmed by an equally divided Court, 319 U. S. 732; and *N. O. Public Belt R. Com.* v. *Ward*, 182 F. 2d 564 (Br. 17-19), the complainants sought a judicial review of awards on the merits. The case of *General Committee* v. *M-K-T Railroad*, 320 U. S. 323 (Br. 17-18), involved a dispute concerning the authority of two Railroad Brotherhoods to represent a certain group of employees. The Court held that such a dispute had to be referred to the Mediation Board. No such question is presented in this case nor is Illinois Central seeking a judicial review of an award as in the *Boswell* and *Ward* cases. Illinois Central is only seeking to require the Board to comply with the mandate of the statute. This Court has, on numerous occasions, held that the federal courts have jurisdiction to enforce the commands of the Railway Labor Act. *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548; *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 192; *Graham* v. *Brotherhood*, 338 U. S. 232.

VI.

JUDICIAL ACTION IS REQUIRED.

Judicial action is necessary in this case for the reasons pointed out in *Order of Conductors* v. *Pitney*, 326 U. S. 561.[5] In that case this Court was called upon "to consider to what extent a Federal District Court having charge of a railroad reorganization has power to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents in view of the provisions of the Railway Labor Act, 45 U. S. C., Sec. 151 *et seq.*, giving such power to the administrative agencies established thereunder" (p. 562). The facts were thus stated by the Court:

> "Each union claims that its respective collective bargaining agreement entitles it to supply conductors for five daily freight trains operated within the Elizabethport, New Jersey, yards of the railroad and both pressed their contentions on the reorganization trustees appointed under the provisions of Sec. 77 of the Bankruptcy Act. 11 U. S. C. Sec. 205. The two unions are the Order of Railway Conductors (O. R. C.), which represents road conductors who ordinarily operate trains outside the yards, and the Brotherhood of Railroad Trainmen (B. R. T.), which represents yard conductors who ordinarily operate trains inside the yards. But here, the practice over a period of years had been that at times yard conductors manned some trains outside the yard and road conductors manned some trains within the yard, including the five freight trains here involved. In 1940 the railroad in response to pressure by the O. R. C. agreed that thereafter only road conductors would man the outside trains. However, O. R. C. conductors continued to operate the five daily freight trains within the

5. Followed and reaffirmed in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244.

> yard. In 1943 the railroad was prevailed upon by the B. R. T. to agree to substitute B. R. T. yard conductors for the O. R. C. conductors operating these five trains. Thereupon O. R. C. brought this suit in the reorganization court" (pp. 562-563).

The Supreme Court found that the reorganization court, to settle the dispute, would have to act in the "capacity of a tribunal empowered to grant the equitable relief sought, even though granting that relief requires interpretation of these contracts" (p. 565). This the Court held could not be done because "Congress has specifically provided for a tribunal [National Railroad Adjustment Board] to interpret contracts such as these in order finally to settle a labor dispute" (p. 565). After declaring that the Board is an agency "peculiarly competent to handle the basic question here involved" (p. 566), the Court thus emphasized the duties of the Board, viz.:

> "* * * interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. (Citing cases.) For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood" (pp. 566-567).

The Board has refused to follow this direction in the instant case. It has not given Shears and the Clerks notice and an opportunity to participate in the proceedings instituted by the Telegraphers although that claim is for work presently done by D. A. Shears, a member of the Clerks organization (R. 19-20, 30-31).

In so doing the Board has refused to discharge its duty "to interpret contracts such as these in order finally

to settle a labor dispute," *Pitney* case, 326 U. S. at 565, but, on the contrary, is creating an additional dispute (R. 30-31) and making it impossible for Illinois Central and its affected employees to maintain their respective agreements (Railway Labor Act, Section 2 First) and to effect a prompt and orderly settlement of their disputes as contemplated by the Railway Labor Act [45 U. S. C., Section 151a (5)]. The mere statement of these facts should shock the conscience of a court of equity as it did the court below and bring the case clearly within the exception in the *Pitney* case, 362 U. S. 561, that a court of equity can intervene "where the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * * created to protect the interest of individuals or the public is clearly shown" (p. 566). It is idle to contend that a court of equity is powerless to remedy a situation such as this and that such a court may only invalidate the Board's awards and orders. Such a situation would not only create additional controversies but would also leave the instant controversy as pregnant and the procedure for final relief as futile as before.

Courts can compel the Board to proceed to the performance of its duties as laid down by the mandate of Congress. This Court has frequently exercised its power to order other governmental agencies to obey the law. *Kansas City So. Ry. Co.* v. *Interstate Commerce Commission*, 252 U. S. 178, 187-188; *Miguel* v. *McCarl*, 291 U. S. 442; *Interstate Commerce Commission* v. *U. S., ex rel. Los Angeles*, 280 U. S. 52; *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474; *Roberts* v. *U. S., ex rel. Valentine*, 176 U. S. 221.

It is true here, just as it was in *Order of Conductors* v. *Swan*, 329 U. S. 529, that we are dealing "with a jurisdictional frustration on an administrative level" (p. 525). The Board is thwarting the objective of the Railway Labor

Act promptly, orderly and finally to settle labor disputes and here, as there, "such an administrative stagnation" (p. 524) may be removed by simply requiring the Board to comply with the statute. That is the relief for which Illinois Central prays and to which it is entitled. The Board should be required to dispose of the questions raised by the Telegraphers' claim in a single proceeding after due notice to all employees and unions involved in the dispute, so that the Telegraphers' agreement and the Clerks' agreement can be considered in the light of each other and in the light of any evidence given by all such employees and unions with respect to the usage, practice and custom under those agreements to the end that the dispute may be "finally" settled. *Order of Conductors* v. *Pitney*, 326 U. S. 561, 565.

There can be no doubt that the refusal of the Board to give due notice of hearings, as provided in Section 3 First (j) of the Act, and its refusal to do what the *Pitney* and *Slocum* cases say should be done, has defeated a basic purpose of Congress and has kept the courts occupied with fruitless litigation for many years at large expense to the employees, to the carriers and to the public. Referees have been appointed at additional public expense to decide claims, but they do not get decided. Instead, disputes remain festering, which is just what Congress wanted to avoid when it put 3 First (j) in the statute.

Since 1937, when this Court denied certiorari in the case of *Nord* v. *Griffin*, 300 U. S. 673, the District Courts and the Courts of Appeal, have urged the Board to give due notice of hearings to the employees, to the bargaining representatives of their craft or class, and to the carriers involved in any dispute referred to the Board. But the Board pays no heed. In spite of opinions of this Court in such cases as *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 and

Graham v. *Brotherhood of Firemen*, 338 U. S. 332, on the duty of fair play for all and from all, the Board, with callous indifference and contemptuous disregard "persists with unabated fervor in its often criticized practice." *Allain* v. *Tummon*, C. A. 7 (1954), 212 F. (2d) 32, 35. This being the situation, it is little wonder that in the present case the court below observed (R. 55):

> "It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation."

We believe that the answer is contained in the findings of Fact and Conclusions of Law which supported the permanent mandatory injunction granted September 13, 1954 in the case which the Missouri-Kansas-Texas Railroad Company brought against the Board, the Telegraphers and the Clerks. Those findings, conclusions and final decree appear in the Appendix hereto, for the convenience of the Court.

The Board has been ignoring the will of Congress and the courts despite the judicial guidance which this Court gave the Board in the *Pitney* and *Slocum* decisions, and despite the requirements of due process, simple justice and common sense, the Board remains a law unto itself. We can only say now is the time and here is the place to change this.

We submit that the right to due notice, which is stated so explicitly in the statute, is for the protection of Illinois Central as well as for the protection of the employees and unions involved in the dispute. The requirement embodies the fundamental right to know and meet all opposing claims in one proceeding and to have the issues and contentions of all opposing parties clearly defined so as to be able to meet them by the introduction of evidence and ar-

gument. This fundamental right is a requisite of due process. The refusal to afford that right is not then an irregularity in practice; it is a vital defect.

CONCLUSION.

For the foregoing reasons, Illinois Central submits that this case should be dismissed or, in the alternative, that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN W. FOSTER,
HERBERT J. DEANY,
CHARLES I. HOPKINS, JR.,
Attorneys for Respondent, Illinois Central Railroad Company.

JOSEPH H. WRIGHT,
135 East Eleventh Place,
Chicago 5, Illinois,
Of Counsel.